

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

9 TRUDI HANSEN,)
10 Plaintiff,) 2:06-cv-01509-ECR-RJJ
11 vs.) REPORT & RECOMMENDATION
12 MICHAEL J. ASTRUE,) OF UNITED STATES
COMMISSIONER OF SOCIAL SECURITY) MAGISTRATE JUDGE
13 ADMINISTRATION,) (Plaintiff's Motion for Reversal (#16))
14 Defendant.)

)

This matter came before the undersigned Magistrate Judge on Plaintiff's Motion for Reversal (#16). Having considered Plaintiffs' Motion (#16), Defendant's Response (#18), Plaintiff's Reply (#20), and the Administrative Record, the Court now makes the following Report and Recommendation.

BACKGROUND

20 This case arises out of the denial of Social Security benefits to Plaintiff Trudi Hansen
21 (Hansen). Hansen was born on June 29, 1966, and is considered a younger individual with a high
22 school education. 20 C.F.R. §§ 404.1563 and 404.1564. Hansen applied for Social Security
23 disability insurance benefits on January 3, 2002, claiming the inability to work since May 15, 2000,
24 due to fibromyalgia, chronic fatigue syndrome (CFS) and interstitial cystitus (IC). The claim was
25 denied initially, and again upon reconsideration. A timely written hearing request was filed by
26 Hansen, and a hearing was held on March 10, 2005, by an Administrative Law Judge (ALJ). At the
27 hearing, the ALJ heard testimony evidence from Hansen, Julie Schultz, and Gwen Keliihoomalu, a
28 vocational expert.

1 On March 26, 2005, the ALJ issued his decision, finding Hansen to be not disabled as defined
2 by the Social Security Act. 42 U.S.C. § 401, et seq. Hansen added new evidence, a Functional
3 Capacity Evaluation conducted by Karen Crawford, P.D., dated June 30, 2005, and requested
4 administrative review by the Appeals Council; however, the request was denied, making the ALJ's
5 findings the final decision. Hansen filed the instant action in this Court pursuant to 42 U.S.C. §§
6 405(g).

DISCUSSION

J. STANDARD OF REVIEW

The Social Security Act provides that the reviewing court “shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). In deciding “whether to remand a case for additional evidence or simply to award benefits is within the discretion of the court;” however, remanding the case for further proceedings is unnecessary when the record is fully developed. Reddick v. Chater, 157 F.3d 715, 728 (9th Cir. 1998). The reviewing court must determine whether the ALJ’s decision is free of legal error and is supported by substantial evidence. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). The facts are given a full review to independently determine whether the ALJ’s findings were supported by substantial evidence. Smolen, 80 F.3d at 1279.

Substantial evidence means “more than a scintilla but less than a preponderance.” Id. (citing Richardson v. Perales, 402 U.S. 389, 402 (1971); Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975)). “It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 228 (1938). Thus, the reviewing court “must consider the evidence as a whole, weighing both the evidence that supports and the evidence that detracts from the [ALJ’s] conclusion.” Smolen, 80 F.3d at 1279. “If the evidence can support either affirming or reversing the ALJ’s conclusion,” the reviewing court “may not substitute [its] own judgment for that of the ALJ.” Robbins v. SSA, 466 F.3d 880, 882 (9th Cir. 2006).

1 **II. THE SOCIAL SECURITY ACT**

2 To qualify for Social Security disability benefits, a person must demonstrate that a medically
 3 determinable physical or mental impairment prevents her from engaging in substantial gainful
 4 activity and that the impairment is expected to result in death or to last for a continuous period of
 5 at least twelve months. 42 U.S.C. § 423 (d)(1)(a); see Reddick, 157 F.3d at 721. The Social Security
 6 Act requires that disability claims be evaluated according to a sequential five-step process. 20
 7 C.F.R. § 404.1520(a); see also Reddick, 157 F.3d at 721; Batson v. Comm'r of the SSA, 359 F.3d
 8 1190, 1194 (9th Cir. 2004); Baxter v. Sullivan, 923 F.2d 1391, 1395 (9th Cir. 1991). If a claimant
 9 is found disabled or not disabled at any step in the evaluation process, the review process ends.
 10 Reddick, 157 F.3d at 721. If the ALJ cannot determine whether a claimant is disabled or not
 11 disabled at a step, the ALJ will move on to the next step in the process. 20 C.F.R. § 404.1520(a)(4).
 12 Before the ALJ moves to step four or five, the ALJ must assess the claimant's residual functional
 13 capacity which is used for steps four and five in evaluating the claim. Id. The burden of proof
 14 remains with the claimant until step five, where it then shifts back to the Commissioner. Reddick,
 15 157 F.3d at 721 (citing Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)).

16 At the first step, the ALJ must consider the claimant's work activity, and if the claimant is
 17 gainfully employed, the ALJ will determine the claimant is not disabled. 20 C.F.R.
 18 § 404.1520(a)(4)(i). At the second step, the ALJ must consider the medical severity of the
 19 claimant's impairment(s). 20 C.F.R at §404.1520(a)(4)(ii). If a severe impairment or combination
 20 of impairments that is severe does not meet the duration requirement, the ALJ will determine the
 21 claimant is not disabled. Id. At the third step, the ALJ must consider the medical severity of the
 22 claimant's impairment(s) to see if the impairment(s) meets or equals an impairment listed in
 23 appendix 1 and meets the durational requirement. If it meets the requirements, the ALJ must find
 24 the claimant is disabled. 20 C.F.R at §404.1520(a)(4)(iii). At the forth step, the ALJ must consider
 25 an assessment of the claimant's residual functional capacity and past relevant work. 20 C.F.R. at
 26 §404.1520(a)(4)(iv). If the ALJ finds that the claimant can still do her past relevant work, the ALJ
 27 will find the claimant is not disabled. Id. At the fifth and final step, the ALJ must consider an
 28 assessment of the claimant's residual functional capacity and the claimant's age, education, and work

1 experience to determine whether the claimant can make adjustments to do other work. 20 C.F.R.
2 at §404.1520(a)(4)(v). If the claimant cannot make adjustments to other work, the ALJ will find the
3 claimant is disabled; otherwise, the ALJ will find the claimant is not disabled. Id.

4 The Court now reviews Hansen's case to determine whether the ALJ's decision is supported
5 by substantial evidence and whether the correct legal standards were applied. Smolen, 80 F.3d at
6 1279.

7 **III. THE ALJ'S DECISION**

8 The ALJ made the following thirteen findings:

- 9 1. The claimant meets the nondisability requirements for a period of
10 disability and Disability Insurance Benefits set forth in Section 216(I)
11 of the Social Security Act and is insured for benefits through the date
12 of this decision.
- 13 2. The claimant has not engaged in substantial gainful activity since
14 the alleged onset of disability.
- 15 3. The claimant's fibromyalgia, chronic fatigue syndrome, and
16 interstitial cystitis are considered "severe" based on the requirements
17 in the Regulations. [20 CFR § 404.1520(c)]
- 18 4. These medically determinable impairments do not meet or
19 medically equal one of the listed impairments in Appendix 1, Subpart
20 P, Regulation No. 4.
- 21 5. The undersigned finds the claimant's allegations regarding her
22 limitations are not totally credible for the reasons set forth in the body
23 of the decision.
- 24 6. The claimant has the residual functional capacity to occasionally
25 sit, stand, walk, bend, kneel, reach, and engage in repetitive motions
26 of the wrists, elbows, shoulders, and ankles. Further, she is able to
27 lift and carry less than 10 pounds, but is unable to squat, climb, drive,
28 push, pull, and lift 10 pounds or more.
- 29 7. The claimant is unable to perform any of her past relevant work.
30 [20 CFR § 404.1565]
- 31 8. The claimant is a "younger individual." [20 CFR § 404.1563]
- 32 9. The claimant has a "high school education." [20 CFR § 404.1564]
- 33 10. Given her residual functional capacity and relatively young age,
34 transferability of skills is not an issue in this case. [20 CFR §
35 404.1568]
- 36 11. The claimant has the residual functional capacity to perform a
37 significant range of light and sedentary work. [20 CFR § 404.1567]

1 12. Although the claimant's exertional limitations do not allow her to
 2 perform the full range of light and sedentary work, using Medical-
 3 Vocational Rules 202.20 and 201.27 as a framework for decision-
 4 making, there are a significant number of jobs in the national
 5 economy that she could perform. Examples of such jobs include
 6 work as dispatcher (DOT #239.367-014) (semi-skilled and sedentary)
 7 and telemarketer (DOT #299.357-014) (semi-skilled and sedentary).

8 13. The claimant was not under a "disability," as defined in the
 9 Social Security Act, at any time through the date of this decision. [20
 10 CFR § 404.1520(g)]

11 Record at 25-26. The ALJ determined that Hansen met the criteria for steps one through four. Id.
 12 The ALJ found that: Hansen was not working; she had severe medically determinable impairments
 13 of fibromyalgia, chronic fatigue syndrome, and interstitial cystitis; her impairments were not severe
 14 enough to meet or equal the severity of those listed in Appendix 1; and, she was unable to return to
 15 any of her past relevant work. Id. The ALJ determined that Hansen's residual functional capacity
 16 (RFC) allowed her to perform a significant number of jobs in the national economy; therefore,
 17 Hansen was not under a "disability."

18 Hansen, in her Motion for Reversal (#16) argues that: (1) the ALJ committed legal error "by
 19 not considering the nature of [her] impairments or the record as a whole in making the disability
 20 determination;" (2) legal error was committed by the ALJ when he found her to not be entirely
 21 credible for lack of objective evidence; (3) the ALJ failed to give the proper weight to her treating
 22 physicians; and (4) the ALJ did not meet the burden of establishing that she was able to do other
 23 work. Pl.'s Mot. Reversal (#16) at 3. The Court finds that the ALJ committed legal error when
 24 calculating Hansen's RFC and evaluating step five, thereby discrediting the medical evidence,
 25 Hansen's subjective symptom testimony, and the physicians' opinions.

26 A. Plaintiff's Impairments

27 The ALJ failed to consider all of Hansen's impairments as a whole when issuing his decision.
 28 The ALJ found Hansen to have fibromyalgia, chronic fatigue syndrome, and interstitial cystitis but
 29 did not explain how these impairments, as a whole, affected her overall general health for performing
 30 light and sedentary work. Moreover, SSR 02-2p, Policy Interpretation on the Evaluation of
 31 Interstitial Cystitis, was not used by the ALJ to assess Hansen's RFC or analyze how interstitial

1 cystitis may have limited her ability to work. Although Hansen's interstitial cystitis symptoms were
 2 not as severe as her other impairments, "not severe" impairments when combined with other
 3 impairments may substantially limit a person's abilities to preform past relevant work or future work.
 4 SSR 96-8p.

5 While a "not severe" impairment(s) standing alone may not
 6 significantly limit an individual's ability to do basic work activities,
 7 it may—when considered with limitations or restrictions due to other
 8 impairments—be critical to the outcome of a claim. For example, in
 9 combination with limitations imposed by an individual's other
 10 impairments, the limitations due to such a "not severe" impairment
 11 may prevent an individual from performing past relevant work or may
 12 narrow the range of other work that the individual may still be able to
 13 do."

14 SSR 96-8p at 5 ¶ 2.

15 Interstitial cystitis "is a complex, chronic bladder disorder characterized by urinary frequency,
 16 urinary urgency, and pelvic pain." SSR 02-2p. The diagnosis for IC is one of exclusion, meaning
 17 that "[a] physician must rule out other conditions before making a diagnosis of IC because there is
 18 currently no definitive test to identify IC." Id. Moreover, the diagnosis of IC includes some or all
 19 of the following: (1) "[p]resence of urinary urgency or frequency (day and/or night), either singly or
 20 in combination;" (2) "[p]ain in the bladder and surrounding pelvic region;" (3) "[s]uprapubic
 21 tenderness on physical examination;" (4) "[g]lomerulations (pinpoint bleeding caused by recurrent
 22 irritation) on the bladder wall after hydrodistention on cystoscopy;" (5) "Hunner's ulcers on the
 23 bladder wall after hydrodistention on cystoscopy; and, (6) "[a]bsence of other disorders that could
 24 cause the symptoms." SSR02-2p.

25 Hansen argues that the ALJ committed legal error when her testimony was used to establish
 26 her disability, but then discredited at step five for lack of objective medical evidence in the record.
 27 Record 22-25. The Court agrees. The Court finds that the ALJ did not sufficiently explain how
 28 Hansen's impairment of interstitial cystitis affected her RFC. Therefore, the RFC finding was not
 supported by substantial evidence and legal error was committed.

29 The diagnosis for IC is one of exclusion and the record indicates that Hansen had some of
 30 the symptoms mentioned above; however, the ALJ failed to address this issue. The ALJ concluded
 31 that since no objective medical evidence existed, the impairments were not severe. Record 22-24.

1 On remand, the ALJ, when reevaluating Hansen's RFC and step five, will need to make specific
 2 references to the Record to clear up the inconsistencies in the evidence.

3 The RFC assessment must include a narrative discussion describing
 4 how the evidence supports each conclusion, citing specific medical
 5 facts (e.g., laboratory findings) and nonmedical evidence (e.g., daily
 6 activities, observations). In assessing RFC, the adjudicator must
 7 discuss the individual's ability to perform sustained work activities in
 8 an ordinary work setting on a regular and continuing basis (i.e., 8
 9 hours a day, for 5 days a week, or an equivalent work schedule), and
 10 describe the maximum amount of each work-related activity the
 11 individual can perform based on the evidence available in the case
 12 record. **The adjudicator must also explain how any material
 13 inconsistencies or ambiguities in the evidence in the case record
 14 were considered and resolved.**

15 SSR 96-8p (emphasis added). The ALJ failed to sufficiently resolve the inconsistencies in the
 16 Record. Lastly, because legal error was committed in determining Hansen's RFC, the ALJ will also
 17 need to reevaluate step five.

18 **B. Hansen's Subjective Symptom Testimony**

19 The Ninth Circuit has found that in "deciding whether to accept a claimant's subjective
 20 symptom testimony, the ALJ" must perform the two-step Cotton test and analyze the credibility of
 21 the testimony. Smolen, 80 F.3d at 1281; Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986). If the
 22 claimant satisfies the Cotton test and no evidence of malingering exists, the claimant's testimony
 23 regarding the severity of symptoms may be rejected by the ALJ "only by offering specific, clear and
 24 convincing reasons for doing so." Smolen, 80 F.3d at 1281.

25 **The Cotton Test**

26 Under the Cotton test, the claimant "must produce objective medical evidence of an
 27 underlying impairment which could reasonably be expected to produce the pain or other symptoms
 28 alleged." Smolen, 80 F.3d at 1282 (internal quotations omitted). This is done by having the claimant
 (1) produce objective medical evidence of an impairment(s); and (2) showing that the impairment(s)
 may "reasonably be expected to (not that it did in fact) produce some degree of symptom." Id. The
 claimant is not required to "produce objective medical evidence of the pain or fatigue itself . . . the
 severity thereof . . . [or] of the causal relationship between the medically determinable impairment
 and the symptom." Id. "The Cotton test requires only that the causal relationship be a reasonable

1 inference, not a medically proven phenomenon.” *Id.*; *see Howard v. Heckler*, 782 F.2d 1484, 1488
 2 (9th Cir. 1986). Having the claimant show that her symptoms “could reasonably have caused some
 3 degree of the symptom . . . reflects the highly subjective and idiosyncratic nature of pain and other
 4 such symptoms.” *Id.*

5 In the present matter, by finding Hansen’s testimony not entirely credible, the ALJ failed to
 6 provide specific clear and convincing reasons for doing so. In addition to providing medical
 7 evidence, Hansen testified that she was limited in her ability to work because of the fibromyalgia,
 8 chronic fatigue syndrome, and interstitial cystitis. Record at 298, 120, 121, 133, 185-187, 191, and
 9 194. The ALJ found that she was impaired but when finding her RFC and analyzing step five, the
 10 ALJ stated that her testimony is “disproportionate when she asserts that she cannot perform
 11 substantial gainful activity.” Record at 22. Hansen provided the ALJ with objective medical
 12 evidence and testified that she possessed the pain. Record 318-43. Hansen satisfied the Cotten test.
 13 The ALJ did not find that malingering existed, therefore, the ALJ should have pointed to specific,
 14 clear and convincing evidence when discrediting her testimony. The ALJ committed legal error
 15 when stating that: “[t]he claimant’s physical examinations have been consistently normal and there
 16 is a glaring absence of objective laboratory findings to support her claim of debilitating impairment.”
 17 Record at 22.

18 **Credibility of Hansen’s Statements**

19 “Once a claimant meets the Cotton test and there is no affirmative evidence suggesting she
 20 is malingering, the ALJ may reject the claimant’s testimony regarding the severity of her symptoms
 21 only if he makes specific findings stating clear and convincing reasons for doing so.” *Smolen*, 80
 22 F.3d at 1284; Social Security Ruling (SSR) 96-7p. The ALJ must specifically state the facts in the
 23 record that lead to the conclusion that the symptom testimony is not credible. Social Security Ruling
 24 (SSR) 96-7p helps explain the factors that should be considered when assessing the credibility of
 25 an individual’s statements about pain or other symptom(s). SSR 96-7p. First, the adjudicator must
 26 consider whether the claimant has an underlying medically determinable physical impairment(s) that
 27 could reasonably be expected to produce the pain or symptoms. Next, the adjudicator must assess
 28 “the intensity, persistence, and limiting effects of the individual’s symptoms to determine the extent

1 to which the symptoms limit the individual's ability to do basic work activities." This assessment
 2 must be based on a consideration of all of the evidence in the record, including but not limited to:
 3 medical signs and laboratory findings; diagnosis, prognosis, and other medical opinions provided
 4 by treating or examining physicians and other medical sources; and statements and reports from the
 5 claimant, treating or examining physicians, others having knowledge about the claimant's medical
 6 history, "treatment and response, prior work record and efforts to work, daily activities, and other
 7 information concerning the individual's symptoms and how the symptoms affect the individual's
 8 ability to work." Id.

9 "While an ALJ may find testimony not credible in part or in whole, he or she may not
 10 disregard it solely because it is not substantiated affirmatively by objective medical evidence."
 11 Robbins, 466 F.3d at 883. The adjudicator may not "make a single, conclusory statement that 'the
 12 individual's allegations have been considered' or that 'the allegations are (or are not) credible.'" SSR
 13 96-7p. Moreover, the adjudicator may not simply recite factors described in the regulations for
 14 evaluating symptoms.

15 In the present matter, the ALJ found Hansen credible at step two, but at step five made the
 16 prohibited finding that she was not credible because her testimony was "not substantiated
 17 affirmatively by objective medical evidence." Robbins, 466 F.3d at 883. The ALJ failed to give
 18 specific reasons for discrediting Hansen testimony as required by SSR 96-7p. Robbins, 466 F.3d at
 19 884. The ALJ committed legal error by not citing to substantial evidence to discredit Hansen's
 20 subjective symptom testimony. Even though the ALJ may have given some "facially legitimate
 21 reasons for his partial adverse credibility finding, the complete lack of meaningful explanation gives
 22 [the C]ourt nothing with which to assess its legitimacy." Robbins, 466 F.3d at 884.

23 **C. Credibility of Physicians' Opinion**

24 Similar to the analysis of a claimant's credibility, to discredit a physician's credibility, the
 25 ALJ must make "findings setting forth specific, legitimate reasons for doing so that are based on
 26 substantial evidence in the record." Smolen, 80 F.3d at 1285. The Ninth Circuit has found that
 27 "[b]ecause treating physicians are employed to cure and thus have a greater opportunity to know and
 28 observe the patient as an individual, their opinions are given greater weight than the opinions of

1 other physicians.” Id. In the case at hand, the ALJ properly accepted Dr. Boyd’s opinion but failed
 2 to address many of Hansen’s nonexertional limitations. Record at 23. On remand, the ALJ will need
 3 to discuss Hansen’s nonexertional limitations and how they may or may not affect her ability to
 4 work.

5 **IV. CONCLUSION**

6 The Court has discretion to either remand the case for additional evidence or for an award
 7 of benefits. Reddick, 157 F.3d at 728. If the record is fully developed, remanding the case for
 8 further proceedings is unnecessary. Id. The Ninth Circuit holds:

9 In cases where there are no outstanding issues that must be resolved
 10 before a proper disability determination can be made, and where it is
 11 clear from the administrative record that the ALJ would be required
 12 to award benefits if the claimant’s excess pain testimony were
 credited, we will not remand solely to allow the ALJ to make specific
 findings regarding that testimony. Rather, we will . . . take that
 testimony to be established as true.

13 Varney v. Secretary of Health & Human Services, 859 F.2d 1396, 1401 (9th Cir. 1988); see also
 14 Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1988) (accepting uncontradicted testimony as true
 15 and awarding benefits where the ALJ failed to provide clear and convincing reasons for discounting
 16 the opinion of claimant’s treating physician).

17 In the present matter, the ALJ failed to provide clear and convincing reasons for discounting
 18 opinion and testimony evidence by Hansen. Moreover, the ALJ committed legal error when
 19 calculating Hansen’s residual functional capacity and step five; however, the record is not fully
 20 developed and it is not clear whether the ALJ would be required to award benefits to Hansen had her
 21 testimony been credited. Therefore, since the record is not fully developed, the case will be
 22 remanded to the ALJ to reevaluate Hansen’s residual functional capacity and step five. Further, the
 23 Court orders the ALJ to analyze, determine, and sufficiently explain whether to include Dr. Karen
 24 Crawford’s Functional Capacity Evaluation, pursuant to 42 U.S.C. § 405(g), sentence six, in its
 25 analysis, since the ALJ is in the best position to fairly assess the new evidence.

26 **RECOMMENDATION**

27 Based on the foregoing and good cause appearing therefore,

28 IT IS THE RECOMMENDATION of the undersigned Magistrate Judge that Defendant’s

1 Motion for Reversal (#17) be **GRANTED** to the extent that this matter is remanded to the
2 Administrative Law Judge to redetermine Hansen's residual functional capacity and step five
3 pursuant to this Report and Recommendation.

4 IT IS FURTHER RECOMMENDED that the Administrative Law Judge analyze, determine,
5 and sufficiently explain whether to include Dr. Karen Crawford's Functional Capacity Evaluation,
6 pursuant to 42 U.S.C. § 405(g), sentence six.

7 **NOTICE**

8 Pursuant to Local Rule IB 3-2 any objection to this Report and Recommendation must be in
9 writing and filed with the Clerk of the Court on or before February 9, 2009. The Supreme Court
10 has held that the courts of appeal may determine that an appeal has been waived due to the failure
11 to file objections within the specified time. Thomas v. Arn, 474 U.S. 140 (1985), reh'g denied, 474
12 U.S. 1111 (1086). This circuit has also held that (1) failure to file objections within the specified
13 time and (2) failure to properly address and brief the objectionable issues waives the right to appeal
14 the District Court's order and/or appeal factual issues from the order of the District Court. Martinez
15 v. Ylst, 951 F.2d 1153 (9th Cir. 1991); Britt v. Simi Valley United Sch. Dist., 708 F.2d 452, 454 (9th
16 Cir. 1983).

17 DATED this 26th day of January, 2009.

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21 ROBERT J. JOHNSTON
22 United States Magistrate Judge
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